So also, if we turn to section 2(d) of the Contract Enactment we find that "when at the desire of the promisor, the promisee or any other person has done.....something, such act is called a consideration for the promise." I think these two references to the provisions of our Contract Enactment suffice to dispose of Mr. Farr's first argument.

His second contention raises a somewhat difficult point of law on which Mr. Jeff might have relied during his opening argument. Section 92 of the Evidence Enactment provides, *inter alia*, that when the terms of a contract have been reduced to the form of a document and proved by the production of the same, "no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms." The rule merely binds to a given relation of the transaction itself. Accordingly subsequent waiver or discharge may be shown, and the fourth proviso to section 92 incorporates the rule laid down by Lord Denman in *Goss* v. *Nugent*, 5 B. & Ad. 58 who said:—

"After an agreement has been reduced into writing, it is competent to the parties at any time before breach of it, by a new contract not in writing either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement."

So far it is plain sailing, but Mr. Jeff, in his reply, pointed out that the plaintiff was not a party to the subsequent oral agreement between his father and the defendant purporting to waive payment of half the total debt, and argued that for this reason the plaintiff cannot be bound by it. I must admit that this particular argument has caused me some little anxiety. Mr. Jeff thought that there was no report of the case *Walmesley* v. *Cooper, supra,* on which he relied, and which he had previously cited, in the Seremban Law Library. In that respect he was wrong, for I have found a good report of it in L.J. 1841 Vol. 10 of the New Series at p. 49. After studying that report I have come to the conclusion that the decision [238] in that case, where the effect of a cove- [238] nant by one of two joint creditors not to sue their debtor was the sole question before the Cout, rests upon an old rule of pleading which is stated by Lord Denman C.J. in his judgment in the following terms:—

"A covenant not to sue has been held equivalent to a release on no other principle than that of avoiding circuity of action, i.e. the scandal and absurdity of allowing *A.* to recover against *B.* in one action, the identical sum which *B.* has a right to recover in another action action against *A.* The law, where it clearly detects the possibility of such a waste of the suitor's money and its own process, as well as of the public time, will interfere to prevent its happening. But if the parties thus opposed in interest are not the same, the principle cannot apply. If one of two plaintiffs covenant not to sue for a joint debt, he may be liable for a breach of that covenant, if both afterwards sue. But if he is then sued by the debtor for breach of covenant, he alone must answer for it: the two will have recovered according to the defendant's obligation to them; but that one only will be compellable to refund who has entered into a counter-obligation with their debtor not to sue him."

Here, fortunately, the oral agreement between the plaintiff's father and the defendant was an out and out waiver or release of half the debt, so that the principle on which *Walmesley* v. *Cooper, supra,* was decided has no application thereto. The general rule is that to be found set out at p. 869 of the 17th edn. of *Chitty* on Contracts: "A release of a debt . . . by one of several joint creditors . . . is, in law, a discharge of the debt." That being so, then *a fortiori,* the release of half a debt of one of two joint creditors must surely be a discharge of that half part.

We can now return to the passage at pp. 277 to 279 of the 6th edn. of *Pollock and Mulla* on the Indian Contract and Specific Relief Acts, on which Mr. Jeff placed especial reliance.

Personally I prefer the view expressed by White C.J. in *Annapurnamma* v. *Akkaya* (1913) I.L.R. 36 Mad. 544, to that which commended itself to his colleagues on the Full Bench of the Madras High Court, but so far as this appeal is concerned it does not seem to me to matter which view is the correct one. If the document of the 8th of March, 1933, evidences a promise to pay $460 to two joint creditors, then, since a release of the whole debt by one of them would have been a good discharge, *a fortiori* a release of half the debt by one of them must be an equally good discharge of that half part. If, on the other hand, upon a true construction of this document the promisees are to be taken to be tenants in common and not joint tenants of the debt in accordance with the presumption of equity on which *Steeds* v. *Steeds, supra,* was decided, a construction which commends itself to me, then the plaintiff's father was obviously entitled to release his own half share of the debt, and the plaintiff cannot justify complaint of his father's action in that respect.

For the reasons which I have endeavoured to make plain in the course of a rather lengthy judgment this appeal must, in my opinion, be dismissed, and with costs.

Appeal dismissed.

PUBLISHED BY AUTHORITY

KHOO BOO GAY v. THE HOME INSURANCE CO. LTD.

[O.C.J. (Terrell J.) November 14, 1934]
[Singapore Suit No. 637 of 1933]
[Summons in Chambers No. 932 of 1934]

Practice — Discovery — Non-compliance with an orde for — Dismissal of action — Setting aside judgment — Discretion.

A default judgment may in a proper case be set aside and the whole matter re-opened at the instance of the Official Assignee of the property of an absconding bankrupt plaintiff who has failed to comply with an order for discovery, if the Court is satisfied that the application is not frivolous or vexatious and has merits.

SUMMONS IN CHAMBERS.

Walters for the Official Assignee of the property of Khoo Boo Gay (applicant).

Briggs for the defendants.

The facts and arguments sufficiently appear from the judgment below.

Cur. Adv. Vult.

Terrell J.: This is an application by the Official Assignee of the property of the plaintiff Khoo Boo Gay, a bankrupt, to set aside a default judgment dated the 4th December, 1933 by virtue of which the plaintiff's action was dismissed for want of prosecution under section 352 of the Civil Procedure Code, the plaintiff having failed to comply with an order for discovery. Receiving and adjudication orders were made against the plaintiff on the 8th June, 1934, and thereupon the property of the bankrupt including such rights as he may have had to set aside the judgment of the 4th December, 1933 became vested in the Official Assignee on behalf of his creditors.

The application is made under the provisions of section 325 of the Civil Procedure Code which confers a wide discretion on the Court. It was opposed by the defendants on three principal grounds. It was argued:

(1) that the judgment being perfectly regular, and the plaintiff having wilfully refused to obey an order for discovery, the Court would not as a matter of practice have assisted him and that the Official Assignee is in no better position;

(2) that the applicant must show merits and that on the facts of the present case the defendants have a defence which must inevitably succeed; and

(3) that as a result of the judgment the defendants have altered their position and that it would therefore be inequitable to reopen it.

As regards the first point defendants relied upon the case of *Haigh* v. *Haigh,* 31 Ch. D. p. 478. In that case the effect of failure to comply with the order for discovery was proved to have been fully explained to the plaintiff and the Court was satisfied that she wilfully refused to obey it. In my opinion every application of this kind must be considered on its merits and with particular reference to the facts of the case. I am by no means satisfied that the facts of the present case are similar in essentials to the facts in *Haigh* v. *Haigh.* To begin with it is clear from the affidavits that the plaintiff did not leave the Colony and so fail to comply with the order for discovery for any reason connected with the case. It is not even clear that he was still in the Colony when the order for discovery was made on the 17th November, or that, if he were still in the Colony, it was brought to his notice. He left the Colony because of allegations that he had committed criminal breach of trust of some charitable funds. For all one knows he may have been anxious to prosecute the present action but there were cogent reasons which appeared to him to make an immediate departure from the Colony desirable, if not imperative. It is possible therefore that the plaintiff himself might have been in a position to reopen the matter upon such terms as the Court might direct if he had been in a position to return to the Colony within a reasonable time and if bankruptcy had not supervened. I am satisfied however that when an application of this kind is made by the Official Assignee or a liquidator the Court will consider the matter from rather a different angle. As a result of the receiving order the rights of the plaintiff are by statutory authority vested in a public officer for the benefit of his creditors. It is quite clear that the creditors may have an interest to prosecute or defend an action which the bankrupt himself owing to his embarrassments may have been ready to let go by default, and it is the policy of the Bankruptcy Ordinance to protect creditors even in cases where the law would not grant an indulgence to the bankrupt himself. This principle has been well recognised in England [see *Bennett* v. *Gamgee,* 2 Ex. D. p. 11, and *Sedgwick Collins & Co.* v. *Rossia Insurance Co. of Petrograd,* [1926] 1 K.B. p. 1, *per* Sargant L.J. pp. 15 and 16].

On these grounds therefore I think that the defendants' first objection fails and it is accordingly unnecessary for me to consider whether the departure of the plaintiff in November 1933 was in itself an act of bankruptcy and that accordingly the title of the Official Assignee related back to a date prior to the date of the default judgment.

The defendants' second and main contention was that the applicant can show no merits as one of the defendants' defences, namely that an arbitrator's award is a condition precedent to any [240] action being brought, must inevitably succeed. It was necessary to consider this objection with some care, as, if the Court were satisfied that the plaintiff could not possibly succeed in the action, it would obviously be improper to reopen the proceedings. In the present case the plaintiff sued for the recovery of sums payable under a policy of fire insurance. He originally claimed as on a valued policy and alternatively for damages. The applicant has indicated that he will not proceed with the claim as on a valued policy and has in fact applied in this summons to amend the statement of claim accordingly. The policy itself requires the parties to proceed to arbitration on any question of quantum only but not on questions of liability. In the correspondence before action the defendants at no time insisted in so many words on the question of quantum being referred to arbitration but they indicated that they might set up that all benefits under the policy had been forfeited on the ground that the plaintiff had made a fraudulent claim. When the defendants filed their defence they set up the defence of arbitration clause in the forefront, but also pleaded, not merely as an alternative plea, that the plaintiff had forfeited all benefits under the policy on the ground of fraud. It is to be observed apart from the fact that they did not in unequivocal terms insist on arbitration in the correspondence before action, when the writ was issued they did not take the step of applying for a stay of proceedings as they were entitled to do under section 5 of Ordinance No. 51 (Arbitration), nor did they in their pleadings submit to the trial of the issue of fraud and the other issues by the Court, merely insisting on arbitration on the matter of quantum. They relied on the arbitration clause as an absolute defence notwithstanding the fact that there were issues which an arbitrator could not even consider (see *per* Warrington L.J. in *Woodall* v. *Pearl Assurance Co.,* [1919] 1 K.B. at p. 609).

[240]

Now there can be no doubt that on an application of this kind the Court must be satisfied that the application is not frivolous or vexatious and that the applicant has merits. As regards the first point, this is an application by a Government officer who with the consent of the Colonial Secretary in accordance with the provisions of Ordinance No. 44 (Bankruptcy) has taken legal advice and as a result has come to the conclusion that it is in the interest of the creditors whom he represents that this application should be made. The application therefore is certainly not frivolous or vexatious and indeed the defendants have not suggested that it is. As regards the applicant having merits, I take this to mean that the applicant must satisfy the Court that he has a reasonable prospect of success or at all events has a substantial case which he desires to try (see *per* Cockburn C.J. in *Watt* v. *Barnett,* 3 Q.B.D. p. 183 at p. 185), and accordingly, when an application is made under the circumstances stated above, the Court will only refuse it if satisfied that the action, if restored, cannot possibly succeed. I do not think that it is necessary for the Court on this application to come to a definite finding on the merits of the defence upon which the defendants principally rely. It is sufficient if I point out that the exact conditions which have arisen in this case have not arisen in any of the reported cases. On the one hand the policy in question is identical in terms with the policy in the case of *Jureidine* v. *Mutual British & Irish Millers Insurance Co., Ltd.,* [1915] App. Cas. p. 499. In that case, however, the defendants repudiated all liability under the policy before the proceedings commenced. Here it is argued that the forfeiture of all benefits was only pleaded in the defence and that this distinguishes the case cited. Again, the defendants rely on the authority of *Woodall* v. *Pearl Assurance Co.,* [1919] 1 K.B. p. 593; *Trainor* v. *The Phoenix Fire Assurance Co.,* 65 L.T. p. 825, and on the leading case of *Scott* v. *Avery,* 5 H.L.C. p. 8, 11; but in all these cases the arbitration clause covered both quantum and liability and therefore these cases are not *in pari materia.* I am therefore by no means satisfied that the defence set up in the present case is certain to succeed, and I think that the applicant should be given the opportunity of testing it.

As regards the defendants' third objection, I find it rather difficult to follow. The defendants after judgment paid a certain sum to mortgagees whose interest was indorsed on the policy. They say they would not have paid anything before the judgment in their favour, as this would have been an admission of liability. This may be so, but when they were clearly under no liability at all unless the mortgagees started proceedings. The payment was therefore a purely voluntary payment for which the conduct of the plaintiff cannot be held responsible.

Another argument was that the applicant actually threatens to jettison such part of the plaintiff's claim as he thinks not to be maintainable. The defendants accordingly, or their solicitor, feel aggrieved. On the case as originally presented the defendants felt confident that on the issue of a valued policy they must have succeeded, probably with costs, and now they are going to be deprived of this highly desirable consummation. The answer is that they are under no obligation to defend the case if they do not think that they are likely to be successful. I cannot take this submission very seriously.

I think, therefore, that an order should be made setting aside upon terms the judgment entered on the 4th December, 1933. I think that the applicant should apply to be substituted as plaintiff and to make such amendments to the [241] statement of claim as he may be advised, and I make no order as to any such amendment on this application. It has been arranged that the terms upon which the judgment is to be set aside shall be argued before me in Chambers. [241]

Judgment set aside.

Solicitors: *Allen & Gledhill; Braddell Bros.*

Re A SOLICITOR

[O.C.J. (Whitley Ag. C.J., Mills and Adrian Clark JJ.) May 14, 1936]

[Singapore Originating Motion No. 7 of 1936]

Advocates and Solicitors Ordinance, 1934 — Criminal Breach of Trust.

Where a solicitor has been convicted of actual dishonesty such as misappropriation of money to his own use he ought to be struck off the rolls and not merely suspended.

MOTION.

Eber and *Withers-Payne* for the Singapore Bar Committee.

Knowles for the advocate and solicitor concerned.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

The judgment of the Court was as follows:—

Whitley Ag. C.J.: This was an application by the Singapore Bar Committee that the advocate and solicitor be struck off the roll of this Court. The application was made by originating motion under section 26 of the Advocates and Solicitors Ordinance, 1934 as amended by the Advocates and Solicitors (Amendment) Ordinance, 1936. The solicitor was ordered to show cause under section 26D and on the showing of cause was represented by counsel.

From the affidavit filed by the Bar Committee in support of the motion it appeared that the solicitor was on the 29th day of November, 1935 convicted before the District Court, Singapore, on a charge of having committed criminal breach of trust with respect to a sum of $302.69, an offence punishable under section 406 of the Penal Code. He was sentenced to pay a fine of $80 or in default to two months' imprisonment. Against this conviction he appealed to the High Court and his appeal was dismissed.

The only question which we had to consider was whether he be struck off the roll or whether a period of suspension from practice would be sufficient punishment. We were unanimously of the opinion that our order should be that he be struck off the roll for the following reasons.